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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 GREGORY A. FRANKLIN,  
12 CDCR #E-66269,

13 Plaintiff,

14 vs.  
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16 L.E. SCRIBNER, et al.,  
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18 Defendants.  
19  
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Civil No. 07-0438 BTM (LSP)

**ORDER:**

**(1) DENYING PLAINTIFF'S  
MOTION TO FILE SECOND  
AMENDED COMPLAINT AS MOOT  
[Doc. No. 77]; and**

**(2) GRANTING PLAINTIFF'S  
MOTION FOR EXTENSION OF  
TIME TO SERVE DEFENDANTS  
GIURBINO, BOURLAND AND  
GREENWOOD [Doc. Nos. 79, 80]**

22 **I. Procedural History**

23 On March 8, 2007, Gregory A. Franklin ("Plaintiff"), a state prisoner currently  
24 incarcerated at Calipatria State Prison, proceeding pro se and *in forma pauperis* ("IFP"), filed  
25 a Complaint pursuant to 28 U.S.C. § 1983. Defendants Ochoa, Trujillo, Haley, Nelson, Ortiz,  
26 Vargas, Scribner, Bell and Madden filed a Motion to Dismiss Plaintiff's Complaint pursuant to  
27 FED.R.CIV.P. 12(b). Instead of filing an Opposition, Plaintiff sought and received leave of Court  
28 to file a First Amended Complaint. Plaintiff filed his First Amended Complaint ("FAC") on

1 September 4, 2007. Defendants Bell, Haley, Madden, Ochoa, Ortiz, Nelson, Scribner, Trujillo,  
2 Vargas, Zill and Bass filed a second Motion to Dismiss Plaintiff's First Amended Complaint.  
3 This Court granted Defendants' Motion to Dismiss pursuant to FED.R.CIV.P. 12(b) and 12(b)(6).  
4 See March 5, 2008 Order Granting Defendants' Motion to Dismiss at 15. Plaintiff was granted  
5 sixty (60) days leave to file and serve a Second Amended Complaint on Defendants. *Id.*

6 At the same time, the Court ordered Plaintiff to show cause why the claims against  
7 Defendants Giurbino, Bourland and Greenwood should not be dismissed for want of prosecution  
8 pursuant to FED.R.CIV.P. 4(m). See March 5, 2008 Order requiring Plaintiff to show cause at  
9 2. Subsequently, Plaintiff filed a "Motion to Amend First Amended Complaint" and a "Request  
10 for Extension of Time to File and Serve upon Defendant an Amended Complaint" [Doc. Nos.  
11 77, 80].

## 12 **II. Motion to Amend First Amended Complaint**

13 On March 27, 2008, Plaintiff filed a "Motion to Amend First Amended Complaint" [Doc.  
14 No. 77]. However, this motion is unnecessary in light of the Court's March 5, 2008 Order  
15 permitting Plaintiff leave to file a Second Amended Complaint. In addition, the Court recently  
16 accepted for filing Plaintiff's Second Amended Complaint [Doc. No. 82]. Accordingly, the  
17 Court DENIES Plaintiff's Motion for leave to amend as moot.

## 18 **III. Motion for Extension of Time to Serve Defendants**

19 On April 23, 2008, Plaintiff filed a "Request for Extension of Time to File and Serve  
20 upon Defendant an Amended Complaint" in response to the Court's OSC. In this Motion,  
21 Plaintiff is seeking additional time to serve Defendants Bourland, Giurbino and Greenwood. As  
22 to Defendant Bourland, Plaintiff admits that he forgot to submit the required form to the U.S.  
23 Marshal ("USMS") and requests an extension of time so that he may complete service of the  
24 Second Amended Complaint on Defendant Bourland. See Pl.s' Reply to Order to Show Cause  
25 at 2. However, as to Defendants Giurbino and Greenwood, Plaintiff believes that he provided  
26 the USMS with all the requested information but the USMS failed to properly serve these two  
27 Defendants. *Id.* at 1-2.

28 A review of the Court's docket indicates that the summons for both of the Defendants  
were returned unexecuted by the USMS's office because neither Defendant were currently

1 employed at Calipatria State Prison. For Defendant Greenwood, the remarks made by the  
 2 USMS's office indicated that they "rec'd notice from litigation coordinator that [Defendant  
 3 Greenwood] is at Ironwood State Prison, return unexecuted." *See* Summons Returned  
 4 Unexecuted by Gregory A. Franklin as to M Greenwood, Doc. No. 12. With respect to  
 5 Defendant Giurbino, the remarks made by the USMS's office indicated that they "rec'd notice  
 6 from Litigation Coordinator that [Defendant Giurbino] is @ Sacramento Headquarters, returned  
 7 unexecuted." *See* Summons Returned Unexecuted by Gregory A. Franklin as to G.J. Giurbino,  
 8 Doc. No. 9. The USMS did not attach the written "notice" that they received by the Litigation  
 9 Coordinator at Calipatria State Prison.

10 Accordingly, in light of Plaintiff's pro se status, the Court will GRANT Plaintiff's request  
 11 for extension of time to effect service upon Defendants Bourland, Greenwood and Giurbino.

#### 12 **IV. Conclusion**

13 For all the reasons set forth above, **IT IS HEREBY ORDERED** that:

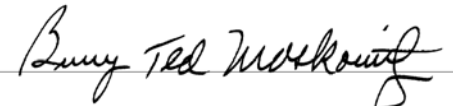
14 (1) Plaintiff's Motion to Amend First Amended Complaint is **DENIED** as moot;

15 **IT IS FURTHER ORDERED** that:

16 (2) Plaintiff's Request for Extension of Time to File and Serve Upon Defendant an  
 17 Amended Complaint [Doc. No. 80] is **GRANTED** pursuant to FED.R.CIV.P. 4(m). The Court  
 18 will grant Plaintiff an additional sixty days from the date this Order is filed to *complete* service.  
 19 Plaintiff shall complete, as accurately and clearly as possible, the USMS Form 285s provided  
 20 to him, and shall return them to the USMS. The USMS is directed to expedite service upon  
 21 receipt of the forms from Plaintiff.

22 (3) The Clerk of Court is Directed to provide Plaintiff with an "IFP Package"  
 23 consisting of: (1) this Order; (2) three certified copies of his Second Amended Complaint [Doc.  
 24 No. 82]; (3) a Summons; (4) blank USMS Form 285s for purposes of attempting service upon  
 25 Defendants Greenwood, Giurbino and Bourland.

26 DATED: July 8, 2008

27   
 28 Honorable Barry Ted Moskowitz  
 United States District Judge

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